March 25, 2019

The Honorable Ben Allen
Member of the Senate
State Capitol
Sacramento, CA 95814

RE: SB 392 – green chemistry: OPPOSE
Set for hearing, 4/3/19 – Senate Environmental Quality Committee

Dear Senator Allen:

The above listed organizations – representing manufacturers, small business, consumer product companies, food producers, agriculture, retailers and others must respectfully oppose your SB 392, legislation that seeks to amend the state's Safer Consumer Products (SCP) program currently being implemented by the Dept. of Toxic Substances Control (DTSC).

Safety is a top priority for our industries and consumers deserve to have confidence that the products they buy are safe for their intended use. Our members invest significant resources in product and environmental stewardship and share a common commitment to advancing the safe and secure management of the products we produce.

Many of our organizations have been active stakeholders with DTSC throughout the regulatory development and implementation process. We want to see the program implemented in an efficient and effective manner that is consistent with the underlying statute and based on sound scientific principles. While we have concerns with the changes proposed in SB 392 as outlined below, we also offer some additional suggestions that we believe would improve the implementation of the entire SCP program.

<u>The Complexity and Variability of Alternative Assessments</u>
SB 392 proposes to allow DTSC to "rely on all or part of one or more publicly available analyses of alternatives to the chemical of concern under consideration…and may proceed directly to a regulatory response." While we understand the intent of this provision is to expedite action by DTSC, it is important to understand that not all Alternatives Assessments (AA) are the same and that each may examine many distinct variables between potential alternatives. Minor changes in weight afforded to criteria, the types of criteria considered, and criteria data sources may lead to vastly different outcomes.

Many AA's have been published in the past decade, yet there is no agreed upon AA approach. While this offers flexibility, it also provides an opportunity to affect the outcome. Additionally, methods for evaluating criteria within AA frameworks can vary, leading to divergent outcomes. Some AA's handle exposure considerations differently, others give greater weight to hazard traits, while others handle data gaps differently. All of these variables can affect the conclusions. Two similar assessments that examine the same criteria, therefore, may arrive at different conclusions based on how each criterion's

data—and data gaps—are assessed. The role of DTSC is to evaluate these nuances once the AA's are completed by each manufacturer. Nothing precludes them from using publicly available AA's as an additional resource, but they should not be used as the only basis for regulatory actions as SB 392 would allow.

Every stakeholder within the value chain, including priority chemical and product manufacturers, will have a unique perspective as to which criteria are more important in an AA. Manufacturers, for instance, may desire chemicals with specific processing capabilities, while retailers may want a product at a particular price point. Consumers, in turn, may focus on product performance. Because these interests vary, any AA framework submitted by the public is likely not to include all relevant factors to manufacturing.

AA's can offer incredible flexibility to assess chemicals and identify alternatives. This flexibility however, can create problems when using third-party, publicly available AAs to evaluate priority chemicals and products. AA frameworks may provide different answers based on their respective methodologies; assessing individual criteria qualitatively or quantitatively may affect the outcome; and publicly available AAs are unlikely to include relevant assessment factors from the perspective of a priority chemical or product manufacturer. By accepting third party AAs into the regulatory system, priority chemical and product manufacturers may be subject to regulations based on these biases rather than a thorough scientific exploration of relevant factors.

The bill ignores the fact that the laws, regulations and guidance is quite demanding in terms of the considerations that must be included and the rigor with which they must be addressed by a responsible party. The same standards must apply to any 3rd party AA accepted as relevant. Further, the bill must require that the AA address specifically the particular chemical/product combination that is at issue, if it is to be germane to the evaluation. Even if an AA submitted by a 3rd party meets these tests, it cannot preempt consideration of an AA provided by the responsible entity.

Expanded Candidate Chemicals List

SB 392 proposes to expand DTSC's candidate chemicals list by adding four new categories. Given the proponents concern that the pace of DTSC's implementation has been slow, it is unclear how this provision will address this issue. The current list of candidate chemicals is approximately 2,500, arguably providing DTSC with a sufficient universe of chemicals to evaluate and consider for future regulation. Adding these new categories is not necessary. Bear in mind, there is a petition process available for any organization or individual to request DTSC add additional chemicals to the candidate chemical list. This is an intentionally robust process to prevent the addition of chemicals that may result in the diluting of the overall program.

While we question the necessity of this provision, there are several concerns with the lists themselves. The inclusion of "(a) Each fragrance allergen included by the European Union in Annex III of the Regulation (EC) 1223/2009… and any subsequent updates to list" does not meet the level of human health hazard that the Safer Consumer Products program was intended to cover and should not be added to the program.

The following list does not exist as defined: "(b) Each asthmagen for which the American Conference of Governmental Industrial Hygienists has established threshold limit values for asthma." The ACGIH does have a category designation called RSEN TLV (for respiratory sensitization threshold limit value), but it's not clear the threshold limit values for these substances are determined solely by the potential to induce sensitization.

Furthermore, we are unclear what is intended by the inclusion of "(d) Each endocrine disrupting chemical identified by the Office of Environmental Health Hazard Assessment." We are unaware of an existing list or a formal identification process of chemicals as endocrine disruptors. It appears this would create a new role for OEHHA without any requirement that they do so through a transparent and public process.

Expanded Data Call In Provision

The legislation would also authorize DTSC to collect specific information from both product and chemical manufacturers. It will be important for SB 392 to include robust language that would protect any confidential business information (CBI). Furthermore, DTSC should be directed to examine existing data call in authority provided to Cal EPA under legislation adopted in 2006 (AB 289). This statute could serve as a framework for a potential data gathering exercise at DTSC. In addition, the proposed fines appear to be unnecessarily excessive and should be revised, a specific timeline for a manufacturer to respond should be determined and not left to DTSC to stipulate, and specific protections for CBI must be included.

Finally, the bill is open-ended in its allowance for data call-in, potentially enabling blanket issue across a large spectrum of a given market, imposing substantial additional demands on both industry and DTSC. The provision should be limited to those designated as priority chemical/product combinations.

Priority Product Workplan

SB 392 includes several requirements for DTSC to include in each Priority Product Work Plan. Of high concern, is Section 25253.9 (3), which requires DTSC to "take into account all the chemicals that can serve the same function in a product such as preservatives, surfactants or fragrances, to avoid the substitution of one chemical with another candidate chemical." In the case of fragrance, individual fragrance ingredients have distinct odor profiles that are entirely different from the scent the entire fragrance formulation creates. Every fragrance ingredient, therefore, serves a different function in a fragrance formulation.

Manufacturers are disincentivized from replacing a chemical of concern for another candidate chemical as part of the AA process for the simple fact they do not want to find themselves repeating the AA process were DTSC to list the candidate chemical in the future. However, they are and should be free to explore those as viable alternatives.

Elimination of Dispute Resolution

The law specifically provides an appeal procedure in the event a responsible party is aggrieved by a DTSC decision. This begins with an informal appeal process but can escalate to an appeal to the Director. This bill would prohibit the step of an appeal to the Director, in cases where DTSC has elected to adopt a regulation. There is no rationale for denying this final administrative remedy merely because the APA-mandated procedures for proposing the regulation in the first place, were followed. This provision should be stricken from the bill.

Opportunities for Improving the Safer Consumer Products (SCP) Program

Though we do have concerns with SB 392 as drafted, we offer the following suggested changes that we believe can help improve the overall effectiveness of the SCP program.

- **Increase Transparency in DTSC Decision Making**
  It remains unclear the process by which DTSC determines how Priority Products are selected for potential regulation. Increased transparency and earlier engagement with potential regulated entities could help DTSC answer questions and make chemical/product selections that are based on accurate information.

- **Prioritize Efforts**
  The SCP program is so sweeping in scope that virtually any chemical in combination with any product can be designated a Priority Product. DTSC should better define its universe of targets to improve program efficiency.

- **Expand Compliance Options**
  A major shortcoming of the SCP program is the lack of regulatory "off-ramps." Regulated entities are not presented with a clear and direct path to comply with the AA portion of the SCP program but instead are required to choose between regulatory pathways that are seemingly endless loops, which extend the regulatory process.

  The enacting statute specifies that DTSC "establish a process for evaluating chemicals of concern in consumer products, and their potential alternatives, to determine how best to limit exposure or to reduce the level of hazard posed by a chemical of concern…" In some cases, alternatives to a specific chemical may not be available but other regulatory actions to "limit exposure" could be implemented. Additional compliance options should be available to regulated entities.

- **Establish Clear Compliance Goalposts**
  Under the current program, it remains unclear what constitutes a complete and acceptable AA. The regulations themselves are inadequate to provide compliance certainty, and while DTSC has issued a substantial set of guidance, it serves primarily as a compendium of available information on the art and science of alternatives assessment, offering little meaningful or practical guidance. While we believe that responsible entities who wish to perform a comprehensive, soup-to-nuts alternatives analysis should have the right to do so (and the commensurate right to have this considered by DTSC), these entities should not be required by law to perform alternatives assessments where it is unclear "how much is enough." This kind of approach – where an agency has unbounded authority to order expenditure of an uncapped amount of money and where it is unclear how and whether the work product will be compliant – raises basic due process and property takings issues.

  We recommend the statute be modified to make clear that regulated entities shall not be required to fund, individually or in the collective, any alternatives analysis in excess of $100,000 without additional justification by the agency (and appropriate notice and comment opportunity).

- **Abridged AA Process Should be Modified**
  The current regulations require that if a "manufacturer concludes that no safer alternative to its Priority Product is functionally acceptable, technically feasible, and economically feasible, or a manufacturer selects an alternative that reduces but does not eliminate the use of Candidate Chemicals in the product…" this may trigger a manufacturer to initiate an open ended grant program that has no parameters or cost containment provisions. This vague language is a disincentive for manufacturers to participate in this effort and the requirement for regulated entities to fund the development of a potentially competitive technology is inappropriate. The

entire premise of an AA is to determine if a product can be made using safer ingredients. An AA should not be a predetermined process that seeks to deselect priority products or drive the development of alternative products.

Thank you for the opportunity to share these concerns and comments. We look forward to working with you and your staff. Please contact Tim Shestek at 916-448-2581 or tim_shestek@americanchemistry.com with any questions or comments.

Sincerely,

Tim Shestek
Senior Director, State Affairs
American Chemistry Council

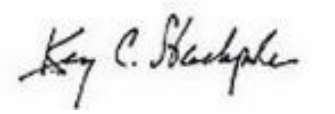
Dawn Koepke
McHugh Koepke & Associates on behalf of the
California Manufacturers & Technology Association

Allyson Azar
State Government Affairs Manager
Household & Commercial Products Assoc.

Tom Jacob
Executive Director
Chemical Industry Council of California

Trudi Hughes
Director of Government Affairs
California League of Food Producers

Lauren De Valencia
Legislative Advocate
California Paint Council



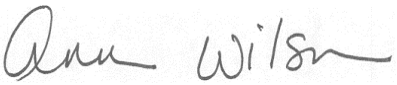
Kerry Stackpole
Executive Director
Plumbing Manufacturers International

Jack Monger
CEO
Industrial Environmental Association

Andy Hackman
Principal Lobbyist
Juvenile Products Manufacturers Assoc.

Jennifer Stowe
Vice President, Government Relations
The Carpet and Rug Institute

Barbara S. Losey
Director
Alkylphenols & Ethoxylates Research Council



Ann Wilson
Sr Vice President, Government Affairs
Motor & Equipment Manufacturers Assoc.

Carlos I. Gutierrez
VP, State & Local Government Affairs
Consumer Healthcare Products Association

Adam J. Regele
Policy Advocate
California Chamber of Commerce

Rachel Michelin
President
California Retailers Association

John Hewitt
Senior Director
Grocery Manufacturers Association

Douglas Troutman
Government Affairs
American Cleaning Institute

Jennifer Gibbons
VP, State Government Affairs
The Toy Association

Amanda Nguyen, J.D.
Director, Government Affairs & Legal
Fragrance Creators Association